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15 **UNITED STATES DISTRICT COURT**

16 **DISTRICT OF NEVADA**

17 LAS VEGAS SUN, INC., a Nevada  
corporation,

18 Plaintiff,

19 v.

20 SHELDON ADELSON, an individual and  
as the alter ego of News+Media Capital  
21 Group LLC and as the alter ego of Las  
Vegas Review Journal, Inc.; PATRICK  
22 DUMONT, an individual; NEWS+MEDIA  
23 CAPITAL GROUP LLC, a Delaware  
limited liability company; LAS VEGAS  
24 REVIEW-JOURNAL, INC., a Delaware  
corporation; and DOES, I-X, inclusive,

25 Defendants.

26 Case No.: 2:19-cv-01667-GMN-BNW

27 **DEFENDANTS' RESPONSE TO**  
**PLAINTIFF'S MOTION FOR LEAVE TO**  
**FILE DOCUMENTS UNDER SEAL**  
**[EXHIBITS 3, 4, AND 5 TO MOTION TO**  
**RECONSIDER PREVIOUS DISCOVERY**  
**RULINGS BASED ON NEW EVIDENCE**  
**AND REFERENCES THERETO] [ECF**  
**NO. 240]**

28 Hearing Date: January 5, 2021  
Hearing Time: 9:00 a.m.

1     **I. Introduction**

2                 On November 25, 2020, the Sun filed its Motion to Reconsider Previous Discovery  
 3 Rulings Based on New Evidence. ECF Nos. 241 and 242 (FUS). In conjunction with that motion,  
 4 the Sun also filed its Motion for Leave to File Documents Under Seal [Exhibits 3, 4, and 5 to  
 5 [ECF No. 241] and References Thereto]. ECF No. 240. In its Motion to Seal, although the Sun  
 6 contends that Exhibits 3–5 are not confidential in nature, it requests that the Court seal them. ECF  
 7 No. 240 at 3:7–10. Defendants disagree that Exhibits 3–5 are not confidential, but agree with the  
 8 Sun that there is good cause to keep these exhibits sealed. *Id.* at 4:5–6.

9                 Exhibits 3–5 are related to a non-dispositive discovery motion that is not “more than  
 10 tangentially related to the merits of the case[,]” so Defendants need only meet the lower “good  
   11 cause” test to justify the sealing of these documents. *See Kamakana v. City & Cty. of Honolulu*,  
   12 447 F.3d 1172, 1179 (9th Cir. 2006) (holding “good cause” is sufficient grounds to seal materials  
   13 attached to a non-dispositive motion”); *see also Ctr. for Auto Safety v. Chrysler Grp., LLC*, 809  
   14 F.3d 1092, 1101 (9th Cir. 2015). Similarly, the public’s right to irrelevant information attached  
   15 to a pleading is low. *See, e.g., In re Nat’l Consumer Mortg., LLC*, 512 B.R. 639, 641–42 (D. Nev.  
   16 June 19, 2014) (holding that because exhibit “was irrelevant to the issues tried in this matter,” the  
   17 “public’s right to know th[e] information as part of a court record is low.”).

18                 Given the highly sensitive, confidential, and commercial nature of Exhibits 3–5, as well  
 19 as their lack of relevancy to the merits of the Sun’s motion to reconsider, the “good cause” test is  
 20 easily met here. **Exhibit 3** (DEFS0028645, 28643–28644) is an email exchange with a highly  
 21 sensitive attachment that the Sun previously sought to be sealed. *See* ECF No. 185 (Sun seeking  
 22 to seal Exhibit 8 to ECF No. 186 (DEFS0028642–28644) and stating it “should remain  
 23 confidential because it conveys highly sensitive information . . .”). Defendants filed a non-  
 24 opposition and joinder to the Sun’s request to keep this document sealed, which is currently  
 25 pending before the Court. ECF No. 196. **Exhibit 4** (DEFS0018959–18960) is another email  
 26 exchange that relates to internal discussions on various issues, including due diligence items prior  
 27 to Defendants’ acquisition of the newspaper, as well as research information on potential  
 28 employees that should not be publicly disclosed where the Review-Journal’s competitors would

1 have access to it. **Exhibit 5** (DEFS0018912) is not only completely irrelevant to the relief the Sun  
 2 is seeking, but this email exchange also implicates the reporter's privilege and should not be made  
 3 public. The Court should grant the Sun's motion and keep Exhibits 3–5 sealed, as well as portions  
 4 of the Sun's brief referencing these exhibits.

5 **II. Argument**

6       **A. The Court Need Only Find “Good Cause” to Seal Exhibits 3–5.**

7           As this Court has noted, the federal courts have long recognized “an exception to the  
 8 presumption of access to judicial records” for non-dispositive motions because “the public has  
 9 less of a need for access to court records attached only to non-dispositive motions . . . .”  
 10 *Kamakana*, 447 F.3d at 1179 (citing *Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 32–33 (1984)).  
 11 “Good cause” is therefore sufficient grounds to seal materials attached to a non-dispositive motion  
 12 or opposition. *Kamakana*, 447 F.3d at 1180 (emphasis added); *Phillips v. General Motors Corp.*,  
 13 307 F.3d 1206, 1213 (9th Cir. 2002) (holding “when a party attaches a sealed discovery document  
 14 to a nondispositive motion, the usual presumption of the public’s right of access is rebutted, so  
 15 that the party seeking disclosure must present sufficiently compelling reasons why the sealed  
 16 discovery document should be released.”).

17           A party that seeks to seal documents filed in connection with a non-dispositive motion  
 18 that is not “more than tangentially related to the merits of a case” is subject to the less burdensome  
 19 “good cause” standard. *Ctr. for Auto Safety*, 809 F.3d at 1101; *Kamakana*, 447 F.3d at 1178-79.  
 20 There is a lesser need for public access to these documents because they are often “unrelated, or  
 21 only tangentially related, to the underlying cause of action.” *Kamakana*, 447 F.3d at 1179.  
 22 Similarly, there is a low public right to irrelevant information attached to a pleading. *See In re*  
 23 *Nat'l Consumer Mortg.*, LLC, 512 B.R. at 641-42 (holding that because exhibit “was irrelevant  
 24 to the issues tried in this matter,” the “public’s right to know th[e] information as part of a court  
 25 record is low.”); *Apple Inc. v. Samsung Elecs. Co.*, 727 F.3d 1214, 1226 (Fed. Cir. 2013) (sealing  
 26 warranted when there was no “indication that th[e] information was essential to the district court’s  
 27 rulings”); *United States v. Snyder*, 187 F.Supp.2d 52, 62-63 (N.D.N.Y.2002) (“[T]he mere filing  
 28 of a paper or document with the court is insufficient to render that paper a judicial document

1 subject to the right of public access ... [T]he item filed must be relevant to the performance of the  
 2 judicial function and useful in the judicial process in order for it to be designated a judicial  
 3 document.”) (internal citations omitted).

4 FRCP 26(c)(1) states that “[t]he court may, for good cause, issue an order to protect a  
 5 party or person from annoyance, embarrassment, [or] oppression . . .,” including one or more of  
 6 the categories enumerated in the rule. Subsection “G” under this rule provides that a court may  
 7 find good cause to “require[] that a trade secret or other confidential research, development, or  
 8 commercial information not be revealed or be revealed only in a specified way.” *Id.* § 26(c)(1)(G).  
 9 Additionally, the heightened compelling reasons test, and therefore also the lower good cause  
 10 standard, are met to seal records when “‘court files might have become a vehicle for improper  
 11 purposes,’ such as the use of records to gratify private spite, promote public scandal, circulate  
 12 libelous statements, or release trade secrets.” *Kamakana*, 447 F.3d at 1179 (quoting *Nixon v.*  
*Warner Communications, Inc.*, 435 U.S. 589, 598 (1978)).

14           **B. There is “Good Cause” to Seal Exhibits 3–5.**

15 Good cause exists to seal Exhibits 3–5 to the Sun’s non-dispositive discovery-related  
 16 motion to reconsider. As discussed below, these confidential documents contain highly sensitive  
 17 business-related information. The Sun’s assertion that they do not contain confidential  
 18 information is simply incorrect. These Exhibits should not be put into the public domain.

19           **Exhibit 3** is an email exchange between Messrs. Russel Pergament, Patrick Dumont,  
 20 Steve Garfinkel, Esq., Grant Williams, and Mrs. Sivan Ochshorn-Dumont, dated January 11,  
 21 2015, with a highly sensitive attachment, entitled, “Preliminary Analysis of Las Vegas Project,”  
 22 dated January 11, 2014 (DEFS0028645, 28643–28644). The Sun previously attached a similar  
 23 email with the exact same attachment to a different non-dispositive motion and filed a  
 24 corresponding motion to seal. ECF No. 185 (Sun seeking to seal Exhibit 8 to ECF No. 186  
 25 (DEFS0028642-28644) and stating it “should remain confidential because it conveys highly  
 26 sensitive information . . .”). Defendants filed a non-opposition and joinder to the Sun’s request to  
 27 keep this document sealed, which is currently pending before the Court. ECF No. 196.  
 28

1       As argued in ECF No. 196, Defendants produced this document in the litigation and  
 2 designated it as Confidential under the parties' Stipulated Confidentiality and Protective Order  
 3 due to its highly sensitive nature. ECF No. 87. This document contains highly sensitive business  
 4 and financial information related to Defendants' corporate due diligence before their acquisition  
 5 of the *Review-Journal* newspaper, including an analysis of current management, finances, cost  
 6 reduction opportunities, business strategy, and contracts. This internal and confidential document  
 7 should not be put into the public domain, especially where the *Review-Journal*'s competitors  
 8 would have access to it. Thus, Defendants respectfully request that Exhibit 3 to ECF No. 241 (*i.e.*,  
 9 ECF No. 241-3) remain sealed.

10       **Exhibit 4** is an email from Russel Pergament to Patrick Dumont, dated October 30, 2015,  
 11 generally discussing matters prior to the Adelson Family's purchase of the *Review-Journal*  
 12 newspaper. Various internal items are discussed, including due diligence items, as well as  
 13 research information on potential employees, that should not be publicly disclosed where the  
 14 *Review-Journal*'s competitors would have access to it. Exhibit 4 to ECF No. 241 (ECF No. 241-  
 15 4) should remain sealed.

16       **Exhibit 5** is an email from Michael Schroeder to Patrick Dumont, dated October 23, 2015.  
 17 There is good cause to seal this exhibit because not only is it irrelevant to the merits of the Sun's  
 18 motion to reconsider, but it also contains information relating to the drafting of an article. *See In*  
 19 *re Nat'l Consumer Mortg.*, LLC, 512 B.R. at 641-42. Such information is part of the news  
 20 gathering process and should remain sealed.

21       Mr. Schroeder is a newspaper publisher and his communications with Mr. Dumont  
 22 relating to an investigative article is protected from public disclosure by the reporter's privilege.  
 23 *See Shoen v. Shoen*, 48 F.3d 412, 416 (9th Cir. 1995) ("[I]f the privilege does not prevail in all  
 24 but the most exceptional cases, its value will be substantially diminished.") (quoting *Zerilli v.*  
 25 *Smith*, 656 F.2d 705, 712 (D.C. Cir. 1981)); *Jimenez v. City of Chi.*, 733 F. Supp. 2d 1268, 1272–  
 26 73 (W.D. Wash. 2010) (privilege applied to records of communications with sources that reporter  
 27 had "intended to culminate in a publicly-consumable publication"); *see also, e.g., Michael v.*  
 28 *Estate of Kovarbasich*, 2015 WL 8750643, at \*2, \*6 (C.D. Cal. Dec. 11, 2015) (privilege covered

1 records of investigative reporter's communications with interview subject); *Harbert v. Priebe*,  
2 466 F. Supp. 2d 1214, 1214, 1216 (N.D. Cal. 2006) (privilege covered "documents, investigative  
3 notes and electronic files" related to news articles); *L.A. Mem'l. Coliseum Comm'n v. Nat'l  
4 Football League*, 89 F.R.D. 489, 493, 496 (C.D. Cal. Jan. 5, 1981) (privilege covered reporter's  
5 materials, including "notes, file memoranda,[and] tape recordings," where permitting disclosure  
6 "would subvert the guarantee of freedom of the press embodied in the First Amendment").

7 In response to the Sun's subpoena for documents in this case, Mr. Schroeder has objected  
8 to public disclosure of similar documents on the same basis. See **Exhibit A** (Schroeder's 9/29  
9 Objection Letter) (asserting the "journalist's privilege" in response to the Sun's subpoena *duces*  
10 *tecum*). The Sun has also withheld similar emails about "confidential draft stor[ies]" asserting the  
11 reporter's privilege. See **Exhibit B** (relevant portions of Sun's 9/3 and 9/19 redaction logs  
12 demonstrating several emails redacted on this basis). There is good cause to seal Exhibit 5 to ECF  
13 No. 241 (ECF No. 241-5) and the reporter's privilege further shields Exhibit 5 from public  
14 disclosure.

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### **III. Conclusion**

Good cause exists to seal Exhibits 3–5 to ECF No. 241 (*i.e.* ECF Nos. 241-3, 241-4, and 241-5). Defendants therefore respectfully request that the Court grant the Sun’s motion to seal (ECF No. 240) and seal Exhibits 3–5 to ECF No. 241, as well as portions of the Sun’s brief referencing these exhibits.

Dated: December 9, 2020

KEMP JONES, LLP

*/s/ Michael Gayan*

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**PROOF OF SERVICE**

I hereby certify that on the 9th day of December, 2020, I served a true and correct copy of the foregoing **DEFENDANTS' RESPONSE TO PLAINTIFF'S MOTION FOR LEAVE TO FILE DOCUMENTS UNDER SEAL [EXHIBITS 3, 4, AND 5 TO MOTION TO RECONSIDER PREVIOUS DISCOVERY RULINGS BASED ON NEW EVIDENCE AND REFERENCES THERETO]** via the United States District Court's CM/ECF electronic filing system to all parties on the e-service list.

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An employee of Kemp Jones LLP

1                   **INDEX OF EXHIBITS**

2 <b>Exhibit</b>	3 <b>Description</b>
4                   A	September 29, 2020, Objection Letter Regarding Subpoena Duces Tecum to Michael Schroeder
5                   B	Relevant Portions of Plaintiff's September 3 and September 19, 2020, Redaction Logs

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